

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLEE**

76-5029

United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter

of

INTERSTATE STORES, INC. formerly known as
INTERSTATE DEPARTMENT STORES, INC., et al.,

Debtors-Appellees.

DOMINICK'S FINE FOODS, INC.,

Appellant,

and

JOHN E. HANCOCK and AMF INCORPORATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE JOHN E. HANCOCK

KRAUSE, HIRSCH & GROSS
Attorneys for Appellee
John E. Hancock
41 East 42nd Street
New York, New York 10017
(212) 956-1124

Of Counsel:

LEWIS KRUGER
JOSEPH SAMET

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Appellant,
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JOHN E. HANCOCK and
AMF INCORPORATED,
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On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLEE,
John E. Hancock

PRELIMINARY STATEMENT

This brief is submitted on behalf of appellee John E. Hancock ("Hancock") on appeal, pursuant to Section 24 of the Bankruptcy Act (11 U.S.C. §47), from an order and decision of the Honorable John M. Cannella, District Judge for the Southern District of New York, dated July 19, 1976 (7a-17a) * reversing one order of Bankruptcy Judge Edward J. Ryan entered May 24, 1976 (91a-92a).

It is also respectively submitted by Hancock in its pending motion seeking an order dismissing the Appeal of Dominick's Finer Foods, Inc., appellant ("Dominick's") to this Court on the ground that said appeal is now moot. It will be demonstrated herein that the appeal is moot for several independent reasons and that the briefs submitted by Dominick's merely obscure the true nature of both Dominick's appeal and the obvious conclusion that the matter on appeal is now moot.

On May 17, 1976 after long private negotiations, a hearing to confirm a sale of real property to Hancock for \$650,000 was held before Bankruptcy Judge Ryan. Dominicks's was permitted to become a party to said hearing over Hancock's

* It should be noted that references in the brief will be made to the Joint Appendix filed by the parties (a)

protestations and an order of May 24, 1976 confirmed a sale to Dominicks's. (76a-90a) Separate notices of appeal of the order were timely filed by Hancock and AMF, Incorporated ("AMF") a substantial creditor and an additional aggrieved party. (134a-136a) An order to show cause why the sale should not be vacated and set aside was heard by Bankruptcy Judge Ryan on June 28, 1976 at which time he denied both the motion and the request for a stay against Dominick's and the Trustee from closing. (427a-497a)

On June 28, 1976 upon the request of Hancock and AMF and joined in by the United States Securities and Exchange Commission (S.E.C.), Judge John M. Cannella stayed the Trustees and Dominick's from proceeding to transfer the subject property pending determination by him of the consolidated Hancock and AMF appeals from Bankruptcy Judge Ryan's May 24, 1976 order confirming the sale to Dominick's for \$685,000. (498a-522a) On July 19, 1976 Judge Cannella reversed the order of Bankruptcy Judge Ryan confirming a sale of real property to Dominick's, ordered that a properly noticed judicial sale be held and remanded to the Bankruptcy Judge. (7a-17a)

A Notice of Appeal from Judge Cannella's order and decision was filed with this Court on August 11, 1976. (3a-6a)

On August 16, 1976, Judge Cannella denied Dominick's August 13, 1976 request for a stay of his order pending appeal. (18a) No stay was obtained by any party hereto from this Court. Pursuant to Judge Cannella's order and decision a properly noticed sale was held and an order was entered confirming the sale to a third party, Patrick J. Doyle, assignee of Hancock, for \$1,210,000, \$525,000 more than the price obtained at the set aside sale. No appeal of this order was pursued by Dominick's and no stay of this sale has been obtained. A closing has been held, escrowed money released, the full purchase price paid, and substantial improvements to the property commenced. The property is about to be opened as a retail store in time for the holiday season.

QUESTIONS PRESENTED

1. Is the Appeal Moot As a Matter of Law Because the Property In Question Was Sold at an Unstayed and Unappealed From Judicial Sale to a Good Faith Purchaser?
2. Did the Court below properly reverse an order of the Bankruptcy Court confirming a sale when notice of the sale did not conform to the requirements of the Bankruptcy Rules and it was apparent that a reopened sale would be of substantial benefit to the creditors?

FACTS

On May 22, 1974 INTERSTATE STORES, INC., et al., filed petitions under the provisions of Chapter XI, Section 322 of the National Bankruptcy Act ("Act") and, thereafter, an amended petition for reorganization pursuant to the provisions of Chapter X of the Act was filed on June 3, 1974. Joseph R. Crowley and Herbert B. Siegal have been appointed as trustees ("Trustees") in reorganization of Interstate Stores, Inc., and Illinois Topps Realty Corp., a subsidiary of Interstate Stores, Inc. also in reorganization under Chapter X of the Act.

Illinois Topps Realty Corp. ("Realty") was the owner of 6.71 acres of land, the improvements thereon and certain property used in connection therewith located at 160 West Joe Orr Road, Chicago Heights, Illinois ("Property").

In the early part of March, 1976, Hancock became interested in the possible acquisition of the Property. During March, 1976, Hancock began to negotiate with Jeffrey Finkel whom Hancock understood to be in charge of real estate of Interstate Department Stores generally, and the person with whom Hancock should discuss the purchase of the Property. Extensive business and legal negotiations with Mr. Finkel and other representatives of the Trustees culminated in a signed contract dated April 20, 1976. (430a-432a)

The notice of the availability of the Property had been widely circulated by the Trustees. Mr. Yassky, an attorney for the Trustees stated, "it can be fairly said that any interested party in the entire Chicago area was aware this Property was for sale." Therefore, the Trustees spent substantial time and effort to conclude this transaction. Several other prospective sales had previously collapsed during the two-year vacancy of the Property. (149a) No agreement or bona fide offers were pending when Hancock entered into the privately-negotiated contract with the Trustees subject only to pro forma approval of the Bankruptcy Court.

The Trustees were delighted with the negotiated contract since it provided for payment of \$650,000, the exact independent appraisal value and would put an end to further negotiations and false starts with respect to this dormant property. (21a)

Hancock incurred substantial expenses seeking to obtain the Property, including, title searches, reports, investigations and legal fees.

In order to expedite the execution of this agreement Hancock's representative came to New York for the purpose of obtaining the signed agreement from the Trustees. Hancock caused the Chicago Title Company to do a title search with respect to the Property, and, in all respects, acted as promptly as possible to acquire the Property. (176a)

The Trustees made an application to the Court on April 29, 1976 seeking confirmation and approval of the sale of the Property to Hancock. Nowhere, as Dominick's would erroneously lead this Court to believe, did the application speak of a "proposed sale", "conditional sale", "conditional contract", or "that other and higher bids would be accepted". Annexed thereto was a copy of the contract entered into between the Trustees and Hancock dated the 20th day of April, 1976, the thoroughly negotiated terms of which provide for the sale of the Property to Hancock, subject only to the approval of the Bankruptcy Court. (19a-75a)

Notice of the hearing called for by the aforesaid Trustees' application was sent to a small group of parties listed in an exhibit to a Notice of Hearing on application dated May 3, 1976. (72a-75a)

The Trustees' application for approval of the contract did not indicate why the time of the notice should be shortened or why the said group of parties listed should be the only people notified of the sale. (19a-72a)

Said notice provided that on May 17, 1976 at 9:30 A. M. a hearing would be held for consideration of an application for an order "(i) approving an agreement between John E. Hancock and the Trustees as Trustees of Illinois Topps Realty Corp. ("Realty") to sell to Hancock the Property and improvements at 160 West Joe Orr Road, Chicago Heights, Illinois for the

price of \$650,000 (ii) transferring all liens and security interests against any of the Property (except permitted encumbrances) to the proceeds of the sale and (iii) authorizing the rejection of the store lease dated May 1, 1961, as amended, by the Trustees as Trustees of Realty." (72a)

Judge Cannella at page 7 of his decision (13a) found that:

"That notice nowhere indicates that alternative offers will be considered at the hearing, nor does it imply that such is the case. In this posture, this Court finds that it was unfair to expect Hancock to attend the sale prepared for competitive bidding."

Not all of the creditors who previously had appeared in this proceeding were notified of the hearing to confirm. AMF, a creditor for \$164,000 of Interstate was not notified. AMF has intervened in the motion to set aside and vacate the original sale and submitted a brief to the Bankruptcy Court calling for a renoticing of the sale in the interests of justice and of the creditors. AMF subsequently filed briefs and motion papers in the various aspects of this case.

Hancock subsequently testified that his understanding was that the approval of the Bankruptcy Court would be a formality and that the purpose of his coming to New York would be to obtain the final order and get it back to Chicago Title by hand, so that the transaction could be consummated prior to the June 1, 1976 closing deadline required by the

express terms of the contract. His understanding was based on his course of dealings with the Trustees' representatives whose consolidated testimony bears out Hancock's testimony. (176a, 431a-437a, 444a-450a).

A few days prior to the hearing for approval of the binding agreement, Hancock was informed by the Trustees of the existence of another "interested party", and that the Trustees might have to enter into negotiations with such a party. Neither the Trustees nor their counsel, however, according to the Trustees' representatives directly informed Hancock or his counsel that open bidding would be invited in Court with Hancock's agreement to serve merely as the opening bid. (448a-449a), (458a-459a) Hancock's uncontroverted testimony was that he was never informed that the contract heretofore entered into would merely become the basis for public bidding. If Hancock knew that the contract was only going to be the minimum floor bid, it is conceivable that he would have offered a lower price on a parcel of property that had been vacant for two years, and reserved his best price for bidding.

Hancock's Chicago counsel informed Messrs. Rotkin and Yassky, attorneys for the Trustees, that, if the Trustees were entering into private negotiations with another party at this time, then Hancock would be free to withdraw from the contract. Messrs. Rotkin and Yassky informed Hancock and counsel that this would not be permitted. (176a-177a)

On May 17, 1976, the scheduled hearing to confirm the sale took place before Bankruptcy Judge Ryan. At that time, Dominick's was permitted to bid for the property and bid \$675,000. Hancock refused to bid at first. After Judge Ryan gave the stunned Hancock fifteen minutes to reconsider, and after great hesitation and a further short delay, but without an adequate opportunity to make financial arrangements and properly assess the situation, Hancock made a matching bid. Dominick's then made a bid of \$685,000 which Hancock refused to match. Hancock withdrew his bid. Judge Ryan accepted the bid of \$685,000. (177a-182a) (76a-89a)

During the course of the hearing, Mr. Yassky, an attorney for the Trustees, stated that there is a binding contract on this Property between the Trustees and Hancock subject to this Court's approval. (76a)

Hancock was not previously advised that the application to confirm the bilateral agreement would be converted, through oral application by the Trustee and his attorneys, at the hearing and without reasonable notice to creditors, into a contract with any third party for the sale of the property which could be approved on the spot. AMF, a substantial creditor, certainly was not notified.

At the hearing, Hancock protested that this hearing was not in accordance with his course of dealings with the Trustees and their representatives. (76a-89a), (177a-182a)

Shortly after the conclusion of the hearing on May 17, 1976, and on the same day, Mr. Hancock advised the Bankruptcy Court and the Trustees by telephone and telegram from Chicago that he was prepared to bid \$725,000 for the property, a sum of \$40,000 in excess of the bid by Dominick's. This was the first opportunity Hancock had to reevaluate his financial capabilities after the shocking turnabout of events and pressure at the Court hearing to confirm his contract with the Trustees. (90a)

On May 24, 1976, an order was signed by the Honorable Edward J. Ryan, Bankruptcy Judge, confirming the sale of May 17, 1976 to Dominick's for \$685,000, despite recognizing that Hancock had made an informal application to reopen the bidding with a bid of \$725,000. (91a-92a as conformed)

At a evidentiary hearing on June 28, 1976, before Bankruptcy Judge Ryan, held in connection with the motion to vacate the order confirming the sale, Hancock submitted an affidavit and testified that he was not prepared to bid at the May 17, 1976 hearing to confirm a sale, that he did not know what his resources were and that he had no reason to believe a hearing other than to confirm a sale was to take place. (175a-182a)

Interstate's real estate representative Finkel testified that he did not tell Hancock directly that there would be public bidding in the Court. He stated that there might be objections in the Court to the price, but did not elaborate further. (444a-449a)

Finkel testified he told Hancock during the course of the private negotiations that the hearing would be to confirm a sale since "I felt there would be no problems at the time we discussed this, for the reason that at that time his was the only offer. The negotiated price was in line with the appraisal and at that time there was nobody else interested in the property ... at the time that Mr. Hancock made his offer, we had another offer which was much lower which we turned down." Mr. Finkel further testified that he told Mr. Hancock that the negotiated figure of \$650,000 was "in line with the appraisal" and that Mr. Finkel "did not anticipate any objection by the Court to his purchase price." Mr. Finkel, after the contract was entered into with Hancock indicated that a third party became interested in the Property. Mr. Finkel at that point did indicate to the third party that "we already entered into a contract with someone else." He did not state to the third party that he could come to Court and bid on that date. Rather he testified "I told him that he could come to Court at the hearing and object to the sale, and I suggested that he speak to our attorneys. (446a-447a)

Mr. Finkel stated that neither he nor Mr. Rotkin informed Hancock's Chicago counsel that there was to be open public bidding. Up to then, his testimony consistently indicated that it was only a hearing to confirm a sale and

allow objections to the confirmation. (444a-449a) Mr. Finkel then belatedly stated that he informed Hancock a few days before the hearing that there could be a bidding situation. (450a) This testimony was clearly and unqualifiedly contradicted by Hancock's subsequent redirect examination as well as Mr. Finkel's previously sworn testimony. (454a-456a)

Mr. Rotkin, worked on behalf of the Trustees in order to confirm the sale. He testified:

Q. did you indicate to Mr. Kaveny that there would be public bidding in this court with respect to the Property?

A. I did not use the words "public bidding". I said someone might come into Court and offer more and might take it away.

Q. What did you assume if someone came into Court and bid more for the Property?

A. Quite frankly, I didn't know what to expect because I had not been to any hearing like this before, so I offered no opinion to anybody about it.

Q. You did not suggest there would be a public bidding?

A. No, I did not use the words "public bidding."
(458a-459a)

Mr. Galowitz of Golenbock & Barell, attorneys for Dominick's stated at the evidentiary hearing that at the hearing to confirm, there was no auction, but that all the court did was accept a higher price for the Property. He stated "The principal consideration that the Court has was the adequacy of the consideration." (483a) This statement also shows the confusion of an experienced attorney who had a different viewpoint as to what was to take place and what took place at the hearing to confirm. This position is certainly different from the position and attitude of the Trustees, its representatives, and agents, as well as Hancock but also supports Hancock's position that neither he nor the Trustees, or their counsel expected public bidding. There was no previous contention by any other parties who appeared in this matter that Hancock's purchase price of \$650,000 was inadequate, especially since the appraisal submitted to the Court was for \$650,000.

On June 28, 1976, upon a denial by Bankruptcy Judge Ryan of Hancock's motion to vacate and set aside the order confirming the sale, an application was made by Hancock and AMF to the District Court for a stay of the parties from conveying the property. Judge Cannella heard oral arguments by the parties. Jerome Feller, Esq., of the Regional Office of the SEC was present and agreed that the stay should be granted. (515a-516a) Mr. Feller, (514a-516a), who observed all the testimony and arguments at the hearing to set aside

and renoteice the sale, on the record, stated to the Bankruptcy Court: (485a-487a)

"...Mr. Hancock did appear in Court at the hearing on May 17 and he was confused. I think, if anything, the record indicates that, at least that."

"I do represent the public interest here. I do represent the larger estates, the many creditors, and many stockholders having a pecuniary interest in this estate."

Mr. Feller recognized that Hancock advised the Court seven (7) days prior to the entry of said order to confirm that he was ready, willing and able to increase the bid by \$40,000. Mr. Feller indicated that the Court is a Court of equity and that the parties have to weigh the equities of the buyer (Dominick's) together with the other larger interests in the estate. (485a-487a)

Judge Cannella first stayed the parties from closing for a week and subsequently until determination of the AMF and Hancock consolidated appeals from the order dated May 24, 1976 confirming the sale.

This stay was issued in light of Hancock's proposal in an affidavit to bid \$725,000 as an opening bid in any subsequently noticed sale of the Property. (521a-522a)

On July 19, 1976 Judge Cannella reversed the May 24, 1976 order of Judge Ryan, thereby divesting himself of jurisdiction, and remanded for a renoticed sale stating in part:

"The Court finds that the failure of the

notice to indicate that counter-offers would be accepted when taken in conjunction with the fact that the notice procedure did not comply with Bankruptcy Rule 10-209 requires that the sale be set aside..." (12a)

"The notice nowhere indicates that alternative offers will be considered at the hearing, nor does it imply that such is the case. In this posture, this Court finds that it was unfair to expect Hancock to attend the sale prepared for competitive bidding..." (13a)

"This conclusion is bolstered by the uncontradicted claim of Hancock's counsel that it is the general practice in this district for the notice to recite that an offer has been made and that other bids will be accepted on or before the return date. The Court's research indicates that such a procedure was followed in R. Hoe & Co., 69 B. 461 (Memorandum of Nov. 3, 1975) (Chapter X) (Conner, J.); W. T. Grant & Co., 75 B. 1735 (Memorandum of May 17, 1976) (Chapter XI) (Wyatt, J.); Continental Vending Machine Corp. 63 B. 663 (E.D.N.Y. Memorandum of July 7, 1964) (Mishler, J.) (Chapter X). In that the instant notice did not include such a recital and in that the Rule provides for whatever notice the judge deems necessary, the Court believes it was unfair to permit open bidding at the return date in light of Hancock's protestations that he was unprepared for such an eventuality." (14a)

On August 11, 1976 Dominick's filed a Notice of Appeal to this Court (3a-6a).

Pursuant to the express terms of the Trustees' agreement with Dominick's, the agreement was terminated on August 13, 1976.

On Friday, August 13, 1976, Dominick's, aware that an agreement to sell the Property to Hancock for \$725,000 was about to be executed by the trustees, sought to obtain an order for either of two reliefs, first, staying Judge Cannella's order vacating the May 24, 1976 order of Bankruptcy Judge

Ryan authorizing the trustees to consummate the sale to Dominick's or, secondly and alternatively, enjoining the trustees from entering into any transaction to dispose of the aforesaid real property pending Dominick's appeal to this court. (a- a)

This proceeding was noticed by telephone call from counsel for Dominick's to counsel for Hancock at 12:30 P. M. on said day and in point of fact Hancock's counsel did not receive a copy of the motion papers until the 3:00 P.M. meeting with Judge Cannella's law clerk. (a- a)

Dominick's motion papers together with a responding letter from Hancock's counsel were presented to Judge Cannella's law clerk. AMF and the trustees apparently were not informed of the motion and did not appear. The law clerk informed the parties that Judge Cannella was absent but that he would telephone Judge Cannella and report to the parties the Judge's decision. (a-)

Judge Cannella's law clerk informed counsel later that afternoon that Judge Cannella had denied Dominick's application for a stay and would shortly issue an order and brief memorandum. Thereafter, Dominick's apparently approached the clerk of this court seeking ex parte to appeal from Judge Cannella's order denying a stay but was informed that there was no Judge available late on that Friday afternoon.

(a- a)

Dominick's never appealed from Judge Cannella's order denying their request for a stay, never sought a stay in this court, never filed a supersedeas bond, although they recognized, as Mr. Silverman's affidavit in support of the motion for a stay makes clear, that "in either event the appeal would become moot and Dominick's would thus forfeit the right of appeal and all its rights under the prior contract between Dominick's and the trustees....(Silverman affidavit p. 3, par. 5) (a- a). Indeed the Court should grant such a stay where a denial would render the appeal subject to dismissal on grounds of mootness and where equitable considerations such as irreparable harm to Dominick's and the merits of Dominick's appeal weigh heavily in Hancock's [sic] favor." (Silverman affidavit, p. 6, par. 7) (a- a)

On Monday, August 16, 1976, Judge Cannella's written order and memorandum was made available to the parties and the stay having been denied, an agreement was entered into between the trustees and Hancock for sale of the Property to Hancock for \$725,000, which agreement (538a-576a) became the subject of the properly noticed sale (577a-585a) to Hancock or to such other person who might make a higher or better offer.

At the hearing Dominick's moved for an adjournment of the sale.

Judge Ryan denied Dominick's request for an adjournment of the sale pending the outcome of this appeal because he acknowledged that Judge Cannella had already disposed of that request by denying Dominick's application for a stay.

(September 10, 1976 Tr. 7-8)* (a- a). Contrary to Dominick's erroneous allegation on page 6 of its brief in opposition to the motion to dismiss, Bankruptcy Judge Ryan never expressed an opinion that the sale was to be held subject to the pending appeal. At no time during the course of the hearing to sell the Property, as Dominick's would lead this Court to believe, did any of the appellees or Doyle agree expressly or by implication that the sale was to be made subject to a pending appeal. Tr. 7-8 (a- a).

The statements by counsel lead to the inescapable conclusion the sale would go forward without the waiving of any rights by appellees, or Doyle and without the imposition of conditions. Doyle in fact was only the assignee of Hancock's contract for \$725,000. The moment the September 10, 1977 bidding started Doyle independently did his own bidding which bidding culminated in his successful purchase of the property for \$1,210,000.00.

The sale was then conducted by Judge Ryan with spirited bidding by Dominick's and Hancock's assignee, Doyle. Doyle was not a party to any of the court hearings, on May 17, 1976, at the initial sale, the hearing before Bankruptcy

* "Tr" refers to transcript of the September 10, 1976 hearing before Bankruptcy Judge Ryan at which time Doyle successfully purchased the property for \$1,210,000

Judge Ryan and Judge Cannella on June 28, 1976 or the hearing for a stay on August 13, 1976 before the District Court.

The fact of the matter is that Doyle became Hancock's assignee shortly preceding the September 10, 1976 sale of the Property. Doyle was aware of the pending appeal but waived only the condition of marketability by virtue of the pending appeal and represented that he would not assert the appeal as a cloud on title which would preclude his obligation to pay the purchase price and close on the property, so long as there was no stay. Never did Doyle state or imply that he would take the property subject to the pending appeal nor did Bankruptcy Judge Ryan or any of the appellees participate in the sale with the pendency of the appeal a precondition.

Dominick's bid up to and including \$1,200,000 but fell short of the successful bid by Doyle of \$1,210,000 which is \$525,000 more than the \$685,000 Dominick's alleges it should pay to obtain the property.

The sale to Doyle was confirmed by an order of Bankruptcy Judge Ryan dated September 14, 1976 for \$1,210,000.

(a- a)

Further, the order confirming the sale to Doyle which was entered on notice to all parties did not provide that the title acquired by Doyle was defeasible and nowhere does the record indicate that Doyle was acquiring a defeasible

title. Rather Doyle's counsel properly pointed out (transcript pages 26-27, 29) (a- a) that while Doyle would waive marketability and go forward with the consummation of the sale, he would do so only if the consummation of the sale were unstayed.

A notice of appeal from Judge Ryan's order confirming the sale to Doyle was improperly filed by Dominick's in the District Court but that appeal was subsequently abandoned by Dominick's.

No stay of this order confirming the sale to Doyle was obtained.

Mr. Doyle was not a party to the May 17, 1976 sale which is the subject of this appeal and neither he nor the Property he acquired are before this court. Doyle is clearly a stranger to this appeal.

A closing was held pursuant to the terms of the September 14, 1976 order and a deed was delivered and recorded. The funds held in escrow by the Trustees was then released and the full purchase price paid.

Doyle has contracted to erect a new roof in the premises for approximatley \$76,000 because the building as conveyed had a severely defected leaky roof and the roofing work is relatively completed. An additional \$400,000 of renovation is underway so that the premises can open in time for Thanksgiving and end-of-the-year holiday business.

The improvements have been made in reliance on court orders authorizing the sale and upon no stay having been issued by a court with jurisdiction.

POINT I

THIS APPEAL IS MOOT AS A MATTER OF LAW
BECAUSE THE PROPERTY IN QUESTION WAS SOLD
AT AN UNSTAYED AND UNAPPEALED FROM
JUDICIAL SALE TO A GOOD FAITH PURCHASER.

A. Bankruptcy Rule 10-801 and Bankruptcy Rule 805 Preclude any Attempt to Vacate the Sale of the Property to Doyle

Bankruptcy Rule 10-801 and Bankruptcy Rule 805 provide that:

"Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal".

The Advisory Committee's Note states:

"Paragraph (2) of this rule is in accord with case law effectuating a sale pending appeal to a good faith purchaser in the absence of the appellant obtaining a stay of the order approving the sale."

The exact same language requiring a stay order is found in Bankruptcy Rule 805 and Chapter XI Bankruptcy Rule 11-62(2).

The effect of these portions of the Rules is that where a good faith purchaser acquires property at a sale conducted by the Bankruptcy Court, unless his purchase is stayed, then even though an appeal is taken with respect to his purchase, absent a stay, the purchase may not be set aside.

These facts render this appeal moot. There is substantial

commentary at 14 Collier on Bankruptcy at pp. 11-62-9 through 11-62-12 that Dominick's failure to obtain a stay permitted the Trustees to convey good title to a purchaser for value, even one who had notice of an appeal. No stay was obtained. The instant case falls squarely within the underlying policy considerations of Bankruptcy Rules 805, 11-62, and the counterpart in a Chapter X case, as Interstate Stores is now engaged in, Bankruptcy Rule 10-801.

The pertinent part of Rule 805 is derived from Rules 8(a) and (b) of the Federal Rules of Appellate Procedure and part is derived from Section 39c of the Bankruptcy Act. Rule 805 does not supersede the last sentence of Section 39c of the Act but, in essence, retains its substance. Case law under Section 39c also is part of the development of Rule 805. This case law supports the conclusion that this appeal must be dismissed as moot.

It needs no saying to this court that the integrity of a properly noticed and properly conducted judicial sale has always been a keystone, not only of Bankruptcy Law and practice, but of the practice of all Federal courts. The purposes and function of judicial sale is to dispose of property with finality, so that the purchaser and the estate which is the beneficiary of the sale may be properly secure in the knowledge

that what has been accomplished is not likely to be undone. In the within proceeding a properly noticed and conducted judicial sale to Doyle has been consummated and in the light of the fact that no perfected appeal was taken from such sale, that sale has obtained the benefits of the full force of the order of the Bankruptcy Court confirming this sale. The result is that the Property is no longer before this court and no longer can be reached by a decision of this court, since it is in the hands of a good faith purchaser, pursuant to a final order of the Bankruptcy Court.

Dominick's failure to procure a stay meant that the parties against whom this appeal was taken, Hancock, the Trustees, and AMF could rely on the order of the Bankruptcy Court and District Court as final notwithstanding the mere filing of a notice of appeal. Where, as in this case, a highly beneficial sale is confirmed, from which no appeal is taken or stay obtained, and which sale is in the best interests of creditors and a subsequent closing is held and substantial improvements are made and contracted for by the purchaser, the relief sought by Dominick's is beyond the power of undoing, and would work a constructive fraud on Interstate's creditors. If this appeal was to have substance, the procurement of a stay to preclude the subsequent sale was virtually mandatory.

14 Collier on Bankruptcy 11-62-9, unless, as is not the case here, there was no sale and transfer of property.

It is interesting to note that Judge Ryan denied Dominick's request for an adjournment of the sale pending the outcome of this appeal because he acknowledged that Judge Cannella had already disposed of that request by denying Dominick's application for a stay (Tr. page 8 (a - a)). Contrary to Dominick's erroneous allegation on page 6 of its brief in opposition to the motion to dismiss, Bankruptcy Judge Ryan never expressed an opinion that the sale was to be held subject to the pending appeal. At no time during the course of the hearing to sell the Property, as Dominick's would lead this Court to believe, did any of the appellees or Doyle agree expressly or by implication that the sale was to be made subject to a pending appeal (Tr. 7-8 (a -)).

The statements by counsel lead to the inescapable conclusion the sale would go forward without the waiving of any rights by appellees, or Doyle and without the imposition of conditions.

Further, the order confirming the sale to Doyle which was entered on notice to all parties did not provide that the title acquired by Doyle was defeasible and nowhere does the record indicate that Doyle was acquiring a defeasible title, rather

Doyle's counsel properly pointed out (Tr. pages 26-27, 39 (a - a)) that while Doyle would waive marketability and go forward with the consummation of the sale, he would do so only if the consummation of the sale were unstayed. It is, therefore, clear that Doyle is entitled to all the protections and benefits of Bankruptcy Rules 10-801 and 805.

B. Judge Cannella Denied Dominick's Request for a Stay and Dominick's Obtained No Stay of the Sale to Doyle.

Dominick's urges this court that Judge Cannella's decision of August 16, 1976 denying their request for a stay had the effect of making any subsequent purchase of the Property at a judicial sale subject to being defeased by the within appeal. This argument is deceptive in its simplicity but is without support, either on the facts or in the law. Judge Cannella by remanding the case back to the Bankruptcy Court on July 19, 1976 had completely divested himself of jurisdiction.

On August 11, 1976 Dominick's filed a Notice of Appeal from Judge Cannella's July 19, 1976 Order and Decision. (3a - 6a)

It is inconceivable that on August 11, 1976 when Dominick's filed its Notice of Appeal to this court that the District Court had reserved any jurisdiction.

It is well settled that the filing of a Notice of Appeal from the District Court divests the District Court of all

jurisdiction in a bankruptcy case, except to the extent that jurisdiction is reserved to the District Court by statute or rule. Thus, the District Court could properly rule on the issue of whether a stay pending appeal could be granted. It could not, however, assert jurisdiction in any other fashion.

Reference is made to In re Federal Facilities Realty Trust, 227 F. 2d 651 (7th Cir., 1955), a Chapter X proceeding. In that case, an appeal was taken from an order of the District Court sitting in bankruptcy. Thereafter, supersedeas was allowed by the District Court. Eight days after the court entered its supersedeas order, the District Court vacated the stay. On appeal, the issue was whether the District Court had jurisdiction to vacate the stay. The Seventh Circuit stated:

"It is well settled that filing a notice of appeal from a District Court's judgment vests jurisdiction over the cause appealed in the court of appeals. Thereafter the trial court has no power to modify its judgment or take other action affecting the cause without permission of the appellate tribunal, except insofar as jurisdiction is expressly reserved in the District Court by statute or the Federal Rules of Civil Procedure * * * to act in aid of the appeal." (Emphasis supplied)

In re Taylor v. Wood, 458 F. 2d 15 (9th Cir., 1972) is also in point. That case was a Chapter XII proceeding. There the referee dismissed the petition for reasons not herein

relevant. On review, the District Court reversed. On February 27, 1970, the District Court remanded to the Referee for further proceedings. The debtor appealed to the Ninth Circuit Court of Appeals from the District Court's order on review on March 25, 1970. Notwithstanding the notice of appeal, the District Court, on April 6, 1970, entered an order reversing itself. The Ninth Circuit Court of Appeals held:

"The District Court, however, lacked jurisdiction to enter its order of April 7, 1970 since an appeal had already been taken from its February 27 order. The April 7 order was a nullity." (Citations omitted)

Dominick's in seeking the stay on August 13, 1976, recognized that the failure to obtain the stay would render this appeal moot. Mr. Silverman was quite correct in his affidavit in support of the request for a stay, in which he advanced the argument that absent a stay, a consummated sale might occur rendering the appeal moot.

Dominick's would now have this court believe that the denial of the stay by Judge Cannella somehow inured to Dominick's benefit in that even though the stay was denied, there could not be a consummated sale of the subject property. The juridical concept that Dominick's urges upon this court is that an unsuccess-

ful party in a litigation need not appeal from an order of the court when it finds some language in the court's opinion from which it derives comfort. Carried to its logical conclusion the result would be that orders of courts would be without consequence as each party could determine for itself the effect of the court's opinion in contradistinction to its order.

The alternate argument that Dominick's advances is that the denial of its request for a stay represents in and of itself a modification of Judge Cannella's earlier order vacating Judge Ryan's order confirming the sale to Dominick's. They would have this court believe that the order denying the stay has that effect because of the content of the opinion. Nowhere does Judge Cannella in his order or brief opinion state, indicate or imply that he is modifying his prior order, vacating the sale to Dominick's and remanding the matter back to Bankruptcy Judge Ryan. One would assume that if that were his intention, he would have said so. Indeed, Judge Cannella divested himself of jurisdiction in his July 19, 1976 order and decision whereby he completely remanded the case to the Bankruptcy Court in accordance with his reasoned decision. The only other court with possible but limited jurisdiction at that time was the Court of Appeals pursuant to a timely appeal. Instead, the District Judge did exactly that which Dominick's feared, he denied their request for a stay, thereby permitting a contract to be entered into by

the trustees and Hancock and a subsequent sale to take place in the Bankruptcy Court at which time Doyle acquired the Property after spirited bidding by Dominick's.

Dominick's chose to ignore the various methods to obtain a stay provided for by Federal Rule of Civil Procedure 62 and Federal Rule of Appellate Procedure 8. Instead they would have us believe that they were entitled to rely on the very brief opinion expressed by Judge Cannella in denying the requested stay, while totally ignoring the fact that the stay sought by them was denied.

The Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure both provide a mechanism whereby parties to litigation may obtain stays. The significance of the provisions of the Rules with respect to stays is merely to highlight the fact that absent stays, parties may act upon orders of the courts. The purpose of a stay is to make it possible for a party seeking relief from an order of a court, by an appeal or other appropriate proceeding, to maintain the status quo pending the outcome of the appeal. When Judge Cannella denied Dominick's request for a stay, Dominick's could have posted a supersedeas bond and obtained a stay as a matter of right (F.R.C.P. 62d) 9 Moore's Federal Practice (Second Edition) ¶208.05 or, alternatively, 7 Moore's Federal Practice

(Second Edition) ¶62.06, Dominick's could have requested this court to issue a stay pending the within appeal. They pursued neither course of conduct.

Further, Dominick's urges the entirely absurd theory of law that Hancock, successful in persuading Judge Cannella to deny Dominick's request for a stay, had some obligation itself perhaps to appeal to this court from Judge Cannella's order in its favor for the purpose of pointing out to the court that, while the order was correct, perhaps some of the reasons supporting the order might not be correct. The fact of the matter is that our juridical system is based upon reliance on orders of courts and it is orders that are sought to be stayed and/or appealed from and not the contents of judge's opinions. To find otherwise in this case or in any other case would be to subvert the entire process of Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure and to provide in essence an optional system in which parties could follow the orders of courts only insofar as they, in their wisdom, determine the language of the opinion to be supportive of the decision of the court.

C. Substantial Case Law Supports the Conclusion that the Appeal is Moot.

In the Matter of Abingdon Realty Corporation, 530 F. 2d

588 1976, the Fourth Circuit found the appeal moot under similar facts where the appellant did not obtain a stay. Dominick's seeks to set aside the similarities between the Abingdon case and the instant appeal by arguing that in Abingdon, had the Receiver of A & H and the Trustee of Abingdon perfected their appeal, the result would have been different. In Abingdon, the Trustee of Abingdon and the Receiver of A & H both abandoned the appeal. A & H's counsel then took the position that the cause of action then reverted to the Bankrupt and it had the right to continue the appeal. The court found it unnecessary to consider that argument "or the other points raised by the respective parties". The court instead found that the order of the Bankruptcy Judge approving the sale of the building which was the subject of the appeal had been consummated and had not been stayed pending appeal. Therefore, "No stay of the effectiveness of the orders of the bankruptcy judge was sought by A & H, its receiver in bankruptcy, or anyone else, and the sale had been consummated. An appeal from the orders of the bankruptcy judge had become moot, since under these circumstances the District Judge could not properly have ordered that the sale be set aside. His order dismissing the appeal should be and is hereby Affirmed." The court, therefore, specifically found that the perfection of the appeal need not even be reached for discussion for the reason

that the unstayed consummated sale had occurred and, therefore, the issue is moot. The court cited substantial additional case law when it stated:

"It is settled law that the filing of a petition to review an order of the bankruptcy judge does not stay the effect or operation of the order unless a supersedeas bond is filed or the order itself provides for a stay. Sterling v. Blackwelder, 405 F. 2d 884 (4th Cir. 1969); Taylor v. Austrian, 154 F. 2d 107 (4th Cir. 1946); In re Spier Aircraft Corp., 137 F. 2d 737 (3rd Cir. 1943); Quinn v. Gardner, 32 F. 2d 772, 773 (8th Cir. 1929); In re Stratford Financial Corp., 264 F. Supp. 917, 118 (S.D.N.Y. 1967); 2A Collier on Bankruptcy, 14th ed., 1974, ¶29.26, p. 1526."

In Abingdon, the Court also found applicable the then proposed Bankruptcy Rule 805 which is the present Bankruptcy Rule 805, and whose exact wording and policy was then in effect in Chapter X cases (Rule 10-801). In addition, the Court found the Advisory Committee's Note that the sentence proposed to be added to Bankruptcy Rule 805

"Unless an order approving a sale of property or issuance or a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal." (Emphasis supplied)

is declaratory of existing case law and cited:

"Sterling v. Blackwelder, supra, Taylor v. Austrian, supra. See also Fink v. Continental Foundry & Machine Co., 240 F. 2d 369 (7 Cir.) cert. den. 254 U.S. 938, 77 S. Ct. 1401, I L.Ed 2d 1538

(1957), Sobel v. Whittier Corp., 195 F. 2d 361 (6 Cir., 1952), 11 Wright & Miller, Federal Practice and Procedure: Civil § 2904, n. 31."

In Taylor v. Austrian, supra, where the committee for stockholders, in appealing from an order authorizing Trustees of the debtor in a Chapter X reorganization to sell securities in debtor's portfolio, failed to take steps to stay the operation and effect of the order and the Trustees proceeded to make sales, the appeal was dismissed on the ground that the case had become moot.

See also Kelaghan v. Industrial Trust Co., 211 F. 2d 134 (1st Cir., 1954), where no stay having been sought, the appellees proceeded to complete a consolidation and effectuated the transfer of assets to the new corporation resulting from the consolidation. In view of the supervening development, the appeal was dismissed as moot.

In Brill v. General Industrial Enterprises, 245 F. 2d 465, 469 (3rd Cir. 1956), the Court concluded that:

"Defendant's Motion to Dismiss the appeal was filed on April 20, 1956. Its premises is that the case has become moot in that the sale of assets sought by the plaintiffs to be enjoined has been completely consummated in accordance with the December 29th Order of the District Court and its Opinion of December 30th; to hold otherwise would be to give this appeal, for which no security analogous to an injunction bond has been posted, the practical effect of an injunction."

"We agree."

The Abingdon decision which was decided on January 22, 1976 by the United States Court of Appeals for the Fourth Circuit has since been cited with approval by the United States Court of Appeals for the Seventh Circuit, in Country Fairways, Inc. v. Mottaz, et al., reported at CCH Bankruptcy Law Reports ¶66,023 (August 1976). There the Court held:

Here too there was a confirmed sale to a good faith purchaser. The appeal from the Bankruptcy Court order became moot in the absence of a stay order or the filing of the required supersedeas bond." (Citing Rule 805 of the Rules of Bankruptcy).

The facts of Abingdon case and Country Fairways are not dissimilar from those herein. A properly noticed, conducted and consummated judicial sale unstayed during the pendency of an appeal has rendered the appeal moot.

D. Doyle, the Purchaser of the Property at a Properly Noticed, Conducted and Consummated Judicial Sale is Not Before this Court.

The within appeal is an appeal from Judge Cannella's order of July 19, 1976 vacating Bankruptcy Judge Ryan's earlier order confirming a sale of the Property to Dominick's. Doyle was not a party to that earlier sale, nor was he a party to any proceeding before Judge Cannella. It is abundantly clear that Doyle is, therefore, not before this court in connection with the within appeal.

In the footnote at page 38 to its brief, on mootness,

Dominick's states: ". . . as noted previously, Doyle is Hancock's assignee and principal. Hancock appears in this proceeding as Doyle's agent and nominee. Accordingly in this memorandum the names Hancock and Doyle may be used interchangeably". The fact of the matter is that Doyle became Hancock's assignee shortly preceding the September 10, 1976 sale of the Property and that Doyle was nowhere a party to the within appeal. To suggest that he is a party is really to imply that the September 10, 1976 sale to Doyle is somehow before this court on appeal. That simply is not the fact. Doyle is not before this court, nor is the Property which he acquired.

Dominick's urges at length in its Point I-B pages 12-18 of its brief, and again at page 32 et seq of its brief, that in the absence of a stay, where the purchaser is a stranger and not a party to the appeal, the appeal will be moot. Those are precisely the facts of this situation. Doyle is a stranger to the appeal and by Dominick's own conclusion, since his purchase was unstayed, the appeal is moot. Of course, to suggest that Bankruptcy Rules 10-801 and 805 apply only to "strangers" to the appeal is to suggest nonsense. No one is more likely to be a party to an appeal arising from a judicial sale of property than the purchaser whom Bankruptcy Rules 10-801 and 805 seek to protect. Doyle, in fact, was only the assignee of Hancock's contract for \$725,000. The moment the September 10, 1976 bidding started, Doyle independently did his own bidding, which bidding culminated in his successful purchase of the Property for \$1,210,000.

POINT II

THE FAILURE OF A NOTICE TO INDICATE THAT OTHER OR HIGHER OFFERS WOULD BE ACCEPTED AND THE COURSE OF CONDUCT BETWEEN THE PARTIES REQUIRED THE DISTRICT JUDGE TO REVERSE THE BANKRUPTCY COURT, VACATE THE ORDER OF CONFIRMATION AND ENHANCE THE ESTATE.

Hancock and AMF filed in the District Court, separate notices of appeal from the May 24, 1976 order confirming the sale to Dominick's. The standard to be met in such circumstances was enumerated In the Matter of General Insecticide Co., Inc., 403 F.2d, 629 (2nd Cir. 1968) citing In re Park Distributors, Inc., 176 F.Supp. p.38 (S.D. Cal.1959). The court there found that the standard applicable to review of an appeal from confirmation of a sale is to choose that course which will obtain the best price for the bankruptcy estate. The court clearly discussed the distinction between this standard applicable in cases involving a direct attack in the form of an appeal from an order of confirmation and the standard applicable in cases involving the setting aside of a private sale made by a bankruptcy estate. 4A Collier on Bankruptcy ¶70.98 [17] 1183 (14th ed. 1967), Hancock and AMF timely filed their respective notices of appeal from the order confirming the sale and did not have to meet before the District Court the standard for setting aside a sale. The different standard for setting aside a sale arises in part because an aggrieved party has a longer time to undertake a procedure to set aside a sale and is not constricted by the short

time periods allowed for the filing and perfection of appeals.

Although not applicable in the case at bar, in order to set aside and vacate a judgment or order pursuant to Bankruptcy Rule 924 and Federal Rule of Civil Procedure 60, with recognition of more liberal variations in recent cases, judicial sales are generally to be sustained unless they are "tinged with fraud, error, or similar defect which would in equity affect the validity of any private transaction". 4A Collier on Bankruptcy ¶70.98 [17] , 1183, 1184-94 (14th ed. 1967).

Under the facts and circumstances of this proceeding, there can be no question that Hancock's offer to increase the purchase price by \$40,000 made on the day of the sale combined with his protestations on the lack of proper notice was a direct attack upon confirmation which was continued by the timely filing of the notice of appeal by Hancock. Judge Cannella properly remanded for renoticing the sale for the benefit of the entire estate to preserve the integrity of judicial sales and to protect Hancock's rights.

We find a series of private transactions whereby Hancock entered into a contract dated April 20, 1976 with the Trustees to purchase real property for the sum of \$650,000. Hancock, relying on the representations of the Trustees and the real estate representatives of the debtor, made both to him and to the Court, negotiated in good faith for a business transaction

which he rightfully anticipated would be approved by the Court, absent a clear finding of great inadequacy in the sales price or a substantial problem with the terms of the contract. Such a finding was clearly unanticipated since Hancock had been advised that the contract price was "substantially in line with the appraisal".

No claim was ever made by the Court or the Trustees that the price was inadequate.

The notice of hearing to sell stated only that a hearing to approve and confirm an agreement would be held. This hearing was clearly not labelled, as Dominick's would erroneously lead this Court to believe, a confirmation of a "proposed sale", "proposed contract" or "conditional sale". No one, including the Trustees, their attorneys and representatives, ever stated or intimated that open bidding or an auction would be held on the Property on the return day to "confirm a sale".

At the hearing to confirm the sale, Hancock and his out-of-town counsel were taken aback by the move to open the hearing to public bidding, when up to this point private negotiations had taken place between Hancock and the representatives of the Trustees, without mention of a public auction in which Hancock's contract would be the basis for public bidding. Hancock and AMF were also in the dark as to whether bids could be received after the hearing to confirm. The price was previously settled in good faith on April 20, 1976 at the time of

the signing of the bilateral contract, barring a judicial finding of inadequacy and a subsequent renoticing of the hearing to confirm.

Freehill v. Greenfeld, 204 F. 2d 907 (2d Cir. 1953), cited at pages 21 and 22 of appellant's brief, held that a purchaser who purchased "subject to the approval of the court" could not complain of the fact that property was offered for sale publicly. The contract purchaser was held to the contract, notwithstanding the fact that the property had been offered for sale publicly, over his objection, and the public bids rejected. This case does not stand for the proposition that a contract purchaser has received adequate notice of the time that public bidding will be held or of the finality of such bidding, merely by having been advised that there will be a hearing on the question of whether or not his contract with the Trustee should be approved.

The citation of Bankruptcy Rule 10-209(b) contained in the footnote on page 22 of appellant's brief is entirely irrelevant to the instant case. The quoted portion of the Rule merely provides that a general rather than a specific description of the nature of the property sold is adequate in a notice of sale. The rest of Rule 10-209(b) must be read, including the requirement thereof that the time and place of any public sale must be contained in the notice thereof.

As Judge Cannella properly found through his independent research, and without contradiction in Dominick's brief, that where public bidding is appropriate it is the uniform practice in this circuit as well as throughout the country to recite in the notice of such sales that an offer to purchase has been made, the essential terms thereof, and that other and higher bids will be accepted on the return hearing date. Judge Cannella found that such a procedure was followed in

R. Hoe & Co., 69 B. 461
(Memorandum of November 13, 1975)
(Chapter X) (Conner, J.);

W. T. Grant & Co., 75 B. 1735
(Memorandum of May 17, 1976)
(Chapter XI) (Wyatt, J.);

Continental Vending Machine Corp.,
63 B 663 (E.D.N.Y. Memorandum
of July 7, 1964) (Mishler, J.)
(Chapter X).

Annexed to this brief and marked Exhibit "A" is a copy of a recent notice in comparable circumstances published in connection with the W. T. Grant Co. bankruptcy proceeding which indicates at the top of page two (2) and page three (3) that this proper notice procedure is still applicable.

Former Official Forms 35 and 36, dealing with the sale of real estate, provided that the trustee specifically apply to sell the "property at public auction, upon the following terms and conditions". 13 Collier on Bankruptcy ¶606.07 N. 20 By the use of the language set forth in such forms or at least a reasonable facsimile thereof in

the application and order to show cause dated April 30, 1976, and challenged herein, there would have been no shock, confusion or dashed expectations. There would have been, instead, a fair, clear and decent understanding by Hancock of what he could anticipate at the hearing he was being asked to attend. The usual practice, however, was not followed in this case, leading inevitably to the conclusion that either the Trustees did not contemplate public bidding, or, alternatively, that they did expect public bidding but were content to have their insufficient notice mislead Hancock and other prospective bidders. The testimony clearly supports the former alternative.

The reasonable belief that only a confirmation hearing would be held is borne out by the fact that the property lay vacant for two years prior to Hancock's offer to purchase for \$650,000. Hancock made the initial bona fide offer. No mention was ever made of any attempt to obtain other bids after so many prior attempts to sell had proven fruitless.

At the hearing to confirm, without sufficient opportunity to fully and fairly re-evaluate the legal and business position, a flustered, bewildered Hancock indicated that "at this time" he was not prepared to top the slightly higher offer. The thought, of course, was that an informed judgment could not be made when for the two months prior, intensive planning, projections and negotiations were carried on to arrive at a

\$650,000 purchase price, subject only to the Court's confirmation of the sale.

In fact, Hancock had attended the May 17, 1976 confirmation sale only because he believed that a confirmation order would be issued at once and he could hand carry it to the Chicago Title Company and expedite the title insurance process.

At this hearing, the Court on its own motion, without any notice to the large creditor body, amended the hearing to confirm, to become a hearing to accept a new offer by Dominick's, the only bidder present. One must assume the Bankruptcy Judge thought an amendment was necessary because of the inadequacy of the notice if public bidding was then to be sought.

At page 30 of its brief, Dominick's argues that Hancock waived any possible objection to the conduct of the hearing, inter alia, "by affirmatively participating in bidding". A better descriptive phrase might be "economically coerced and stunned participation". It should be noted parenthetically that Dominick's affirmatively participated in the bidding at the second sale, and, therefore, its argument of waiver is nonsense.

After the hearing was closed and later on the same day, after returning to his Illinois home, when the surprise of the courtroom procedure started to wear off, Hancock reconsidered his economic position and promptly sent telegrams to the court and Trustees' counsel stating that he was prepared

to bid \$725,000 for the property, an increase of \$40,000 over the accepted bid and \$75,000 over the amount Hancock reasonably expected to be confirmed by the court on May 17, 1976 pursuant to the Trustees' notice. The Bankruptcy Judge should have taken cognizance of the fact that legal title had not passed, that an order of confirmation would not be signed for another seven days and that a properly noticed judicial sale could have been renoticed to protect all interested parties and enhance the estate.

Hancock subsequently stated in an affidavit dated June 4, 1976 which was submitted to the Bankruptcy Court and District Court that his telegraphed bid of \$725,000 was a firm offer and that this would be his opening bid at the properly renoticed public sale. Hancock's posture clearly indicated that the estate would be substantially enhanced by this firm offer and possible subsequent offers.

Yet the Bankruptcy Judge refused to assert his prerogative to act as a court of equity May v. Fidelity and Deposit Company of Maryland, 292 F. 2d 259, 261 (10th Cir. 1961); Allen v. Union Transfer Co., 152 F. 2d 633, 635 (10th Cir., 1945) and to find that the interests of the estate were paramount. In Mason v. Ashback, 383 F. 2d 779 (10th Cir., 1967) quoting from Webster v. Barnes Banking Co., 113 F. 2d 1003, 1005 (10th Cir. 1940) and Allen v. Union Transfer Co., supra, the Court said:

"A court of equity may set aside an order of sale either before or after confirmation when it appears that the same was entered through mistake, inadvertence or improvidence.

"While a judicial sale will not be set aside on the ground of inadequacy of price alone, unless the inadequacy is so great as to shock the conscience of the chancellor, inadequacy of price, accompanied with other circumstances having a tendency to cause such inadequacy or indicating any apparent unfairness or impropriety, will justify setting aside the sale. Such additional circumstances may be slight and insufficient in themselves to justify vacating the sale."

(emphasis supplied.)

Even these criteria which Hancock did not have to meet in the District Court under the General Insecticide doctrine are clearly met under the already enumerated facts. The District Court, per Judge Cannella, in reversing and remanding, did equity, corrected fundamental irregularities and provided justice to all parties and the estate by properly renoticing the sale. Dominick's should not, as a result of an improper and misleading notice and course of dealing, be permitted to obtain a windfall at the expense of Hancock and the creditors. The result of the District Court's action is that the estate has been enhanced by \$1,210,000 rather than the \$685,000 offered by Dominick's.

In an analogous Third Circuit case, Times Sales Finance Corporation, 445 F. 2d 385 (1971) the court reversed the District Court and set aside the confirmation of a sale of real property. The original bidder in the court-conducted sale of

real property had not received notice of the hearing on confirmation of the sale, and was not present in the court-room when the sale was opened up for public bidding and a third party became the successful high bidder. In ordering that confirmation of the sale be set aside and another sale hearing be held, the referee ruled that under the undisputable circumstances "to permit this sale to stand would be unconscionable". (Emphasis supplied.) Even the District Court, while reversing the referee, conceded that a fundamental defect arising through accident or mistake vitiates a confirmed sale, citing Collier on Bankruptcy Vol. 4A §70.98 pp. 1183-1187. The Court further stated, "It is unfortunate that the original bidder was not given notice of the confirmation hearing by the Trustee."

In Re Stanley Engineering Corporation, 164 F. 2d 316, 318 (3rd Cir. 1947) understandably provides that the integrity of judicial sales must be preserved. Yet at 318, 319, the court follows that statement up by saying that:

"... judicial sales, made upon due notice and in accordance with law, will be confirmed unless (a) there was fraud, unfairness or mistake in the conduct of the sale ..." (Emphasis supplied.)

See also In Re Times Sales Finance Corporation, 445 F. 2d 385 (1971).

Hancock believes it is clear that under the present facts Judge Cannella properly ruled that the combination of

a "failure of the notice to indicate that counteroffers would be accepted when taken in conjunction with the fact that the notice procedure did not comply with Rule 10-209 provided lawful grounds to set aside and vacate the order of confirmation and remand for a properly noticed sale in the interest of the estate. The subsequent events which enhanced the estate by an additional \$525,000 clearly demonstrate Judge Cannella's vision.

It is submitted that Wolverton, supra, Industrial & Acoustical Sales Inc., supra and Times Sales, supra and other cases cited herein make clear that appellees have met the additional burden of the slightly higher standard for setting aside a confirmed sale that Dominick's would erroneously lead this Court to believe is the standard herein. To find otherwise would benefit Dominick's, who because of the inadequate notice to Hancock and creditors was apparently the only party who, with the knowledge of the Trustees, came to court hoping the public bidding would occur that day.

As the Third Circuit in In Re Times Sales Finance Corporation at 387 states: "The major question is one of common decency ..." (phasis supplied.)

The importance of proper notice of a judicial sale of real property cannot be overly stressed. In In re Galouzis (W.D.N.Y. 1935) the court held that where, in a straight

bankruptcy case, there was failure to meticulously comply with the notice provisions set forth in Bankruptcy Act Section 58 (including the failure to inform the public that there was to be a public sale) "jurisdiction to conduct the sale was lacking, and the sale must be set aside".

The need for compliance with the statutory requirements for a proper judicial sale was stressed in In Re Lake Champlain Pulp & Paper Corporation (N.D.N.Y. 1927) 20 F. 2d 45, where the court noted in a straight bankruptcy case:

"The power of the trustee to sell the bankrupt estate is wholly statutory and a sale otherwise than as the statute directs will not be valid. Black on Bankruptcy, §469 citing Wisner v. Brown, 50 Mich. 553, 15 N.W. 901."

Further the court noted that:

"The essential feature of a public sale was lacking, viz. that the public be invited to attend and bid."

In a recent bankruptcy case, the United States Court of Appeals for the First Circuit, in In Re Gil Bern Industries Inc. et al., Equipment Mart of New York #2 Inc., 2 Bankr. Ct. Dec. (1st Cir. 1975), the issue before the court was the reasonable meaning of the notice of a sale, where the notice was ambiguous and perhaps not reflective of local practice. Under these circumstances the court set aside the confirmed sale and remanded the matter for further proceedings.

A court of equity, in the face of errors in the information as to the nature of the transaction provided by the Trustee

to Hancock as well as in the time, content and recipients of notice of a sale of real property, which notice misled Hancock and others, met its obligation to clear the record by causing a proper judicial sale, properly noticed, to take place where, as in the case herein, title had not passed. The estate of the debtor was, therefore, substantially enhanced by the subsequent sale of the property to Doyle for \$1,210,000, fully \$525,000 more than Dominick's offered to pay.

POINT III

THE NOTICE UTILIZED DID NOT
CONFORM TO BANKRUPTCY RULE 10-209

The second proper ground for Judge Cannella's vacatur of the order below was that the notice procedure utilized did not comply with Bankruptcy Rule 10-209.

Rule 10-209(b) clearly provides that in the case of any proposed sale of property, notice must be given to all creditors unless for cause shown the court shortens the time.

Hancock recognizes that in a Chapter X case of the magnitude of Interstate, economics may dictate that notices not go to all creditors for all court proceedings. However, the Trustees in their April 30, 1976 application never explained to the court why only those parties who have "appeared" in this case should receive notice of the hearing to confirm the sale. Nor did they indicate why many large institutional creditors and their clients with potential interest in the Property should not get notice or why others who have "appeared" in the proceeding did not get notice. Contrary to the notice requirement of the recently enacted Chapter X Rule 10-209, cause was not shown why less than twenty (20) day notice should be given. This was not perishable property, but rather a parcel that lay vacant for two (2) years. The Court determined that notice should be given to all parties who had appeared in the case. Yet, AMF, appellee, an aggrieved and interested party

with a recognized claim of \$164,000 had appeared and did not receive notice. Obviously, many other large and interested claimants, did not receive notice. It was not until the June 28, 1976 evidentiary hearing from which no appeal was taken that any explanation of the limited notice list was offered by the Trustees. Such a late and convoluted explanation after the fact cannot explain away the reasons why Hancock was justifiably misled to expect to "confirm" an agreement and why the rights of creditors of Interstate would not be best served by adherence to the provisions of Bankruptcy Rule 10-209.

The other crucial point concerning the defective notice is that notice of a "proposed sale" under 10-209(b) was not given. Hancock was justifiably lulled into thinking that (a) he was appearing only for a pro forma hearing to confirm a sale, because the purchase price was equal to the appraised value, rather than to protect a bid on a proposed sale, and (b) that other interested parties should only come to the hearing to confirm if they had a major objection to the agreement of sale, since this was not a proposed sale at which the Court would entertain other and higher bids.

Rule 10-209 has yet to be considered by the reported decision. However, failure to strictly adhere to the requirements set forth in Rule §58(a)4 of the Bankruptcy Act*, which is very

* "Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterward filed with the papers in the case by the creditors, of (4) all proposed sales of property: Provided, that the court may, upon cause shown, shorten such time or order an immediate sale without notice;" Bankruptcy Act §58*c(11 U.S.C.A. §94c).

similar to Bankruptcy Rule 10-209, is a ground to set aside a confirmed sale. See also In Re General Insecticide Co. 403 F2d 629 (2nd Cir 1968) which states that the notice requirements for a judicial sale should not be dispensed with for reasons of convenience unless the particular asset would depreciate, or the notice would appreciably reduce the value of the asset due to administrative costs. Thus, where "no notice was given, no order was made shortening time or ordering sale without notice; no good cause was found for not giving notice" the District Court properly set aside a confirmed sale. Wolverton v. Shell Oil Company, 442 F. 2d 666 (9th Cir. 1971). Compliance with these requirements "is mandatory unless 'cause' is shown" and failure to follow them will mandate setting aside the sale. In re Insulation & Acoustical Specialities Company, 426 F 2d 1189 (1970, 8th Cir.). Here there was neither compliance with the rule nor good cause shown for deviation therefrom.

As the drama unfolded in this case, it is clear that Judge Cannella ruled correctly in finding that the law was not complied with and that the estate would be substantially enhanced by a properly renoticed sale.

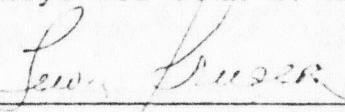
CONCLUSION

For all the reasons stated above, this Court should enter an Order dismissing the Dominick's appeal with prejudice as moot. In the alternative, this Court should enter an Order dismissing the Dominick's appeal with prejudice on the merits and for such other and further relief as is just.

Respectfully submitted,

KRAUSE, HIRSCH & GROSS,
Attorneys for John E. Hancock

By:


41 East 42nd Street
New York, New York 10017
(212) 986-1122

Of Counsel:
Lewis Kruger
Joseph Samet

United States District Court
Southern District of New York

In re
W. T. GRANT COMPANY, } Bankruptcy No. 75 B 1735
Bankrupt.

**NOTICE OF HEARING FOR SALE OF 6,399,300 COMMON SHARES OF ZELLER'S
LIMITED-ZELLER'S LIMITEE, A CANADIAN CORPORATION, AND \$6,060,000
CDN. AGGREGATE PRINCIPAL AMOUNT OF 5½% CONVERTIBLE
SUBORDINATED DEBENTURES SERIES 1971 DUE SEPTEMBER 15, 1991
ISSUED BY ZELLER'S LIMITED-ZELLER'S LIMITEE**

TO ALL CREDITORS AND PARTIES IN INTEREST:

NOTICE IS HEREBY GIVEN that on the 18th day of June, 1976, in Room 234 of the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, at 10:00 o'clock in the fore noon of that day, or as soon thereafter as counsel can be heard, a hearing will be held before the Court for the purpose of considering the application of Charles G. Rodman, as Trustee of the estate of W. T. Grant Company, Bankrupt (the "Trustee"), dated May 27, 1976, for authority and approval of the sale and delivery of 6,399,300 common shares of Zeller's Limited-Zeller's Limitee ("Zeller's"), representing not less than 50.1% of the issued and outstanding common shares of Zeller's, and \$6,060,000 Cdn. aggregate principal amount of 5½% Convertible Subordinated Debentures Series 1971, representing not less than 50.5% of all the outstanding 5½% Convertible Subordinated Debentures Series 1971 due September 15, 1991, to Fields Stores Limited ("Fields"), free and clear of all liens, charges, security interests, adverse claims and encumbrances, in consideration of an aggregate purchase price of \$32,675,000 Cdn., such liens, charges, security interests, adverse claims and encumbrances to attach to the proceeds of sale, all in accordance with the terms and conditions set forth in a certain Purchase Agreement, dated as of May 25, 1976, among Fields, a British Columbia corporation, the Trustee, Morgan Guaranty Trust Company of New York, a New York trust company, and Morgan Guaranty Trust Company of New York, as Agent under a certain Security Agreement, dated as of September 16, 1974, as amended, between W. T. Grant Company and the said Agent, and subject to the terms and conditions of a certain Proceeds Agreement, dated as of May 25, 1976, among the Trustee.

Morgan Guaranty Trust Company of New York, for itself and as Agent under the aforesaid Security Agreement, and a certain Agreement between the Trustee and Morgan Stanley & Co. Incorporated, or to such other offeror who may submit a higher or better offer at or before the said hearing which may be recommended by the Trustee and said Agent and/or accepted and approved by the undersigned Bankruptcy Judge.

THE SHARES AND DEBENTURES HAVE NOT BEEN REGISTERED FOR OFFERING AND SALE UNDER THE SECURITIES ACT OF 1933 (THE "ACT") OR ANY APPLICABLE PROVISIONS OF ANY STATE SECURITIES OR BLUE SKY LAWS. THE PURCHASER MAY NOT SELL THE SHARES AND/OR DEBENTURES EXCEPT PURSUANT TO THE ACT AND SUCH STATE LAWS AND RULES AND REGULATIONS PROMULGATED THEREUNDER. THIS NOTICE DOES NOT CONSTITUTE AN OFFER TO SELL OR A SOLICITATION OF AN OFFER TO BUY THE SHARES AND/OR DEBENTURES IN ANY STATE TO ANY PERSON TO WHOM IT IS UNLAWFUL TO MAKE SUCH OFFER OR SOLICITATION IN SUCH STATE.

The sale of the shares and debentures to Fields, pursuant to and in accordance with the Purchase Agreement and subject to the Proceeds Agreement and the Agreement with Morgan Stanley & Co. Incorporated, is subject to higher or better offers received at or before said hearing which may be recommended by the Trustee and said Agent and/or accepted and approved by the undersigned Bankruptcy Judge. The sale will be made pursuant to the provisions of the Bankruptcy Act. Any interested party may submit an offer or offers to purchase the aforesaid shares or debentures, in whole or in part, to Charles G. Rodman, as Trustee, c/o Weil, Gotshal & Manges, 767 Fifth Avenue, New York, New York 10022, attention Harvey R. Miller, or at the said hearing. All offers must be accompanied by a deposit equal to ten percent (10%) of the purchase price offered, in cash or other funds, acceptable to the Trustee and the Agent. If such offer is accepted, the deposit will be forfeited by the offeror upon any subsequent default by it. All offers shall be irrevocable.

Zeller's is a publicly owned Canadian corporation, founded in 1931, with its head office in Montreal, Canada. It operates a chain of retail and variety stores comprising approximately 156 locations throughout Canada. Further information as to Zeller's may be obtained in the manner provided below.

The sale of the shares and debentures is to be made without warranties or representations except as to good and marketable title and, subject to the receipt, acceptance and approval of a higher or better offer, as provided in the Purchase Agreement. The terms of sale to any other offeror, if the offer is made prior to the hearing, shall be in writing, and if made at the hearing, shall be stated upon the record. In either case, if accepted, the offer shall be incorporated into a definitive written agreement within three (3) business days of such acceptance.

The Trustee's application for authority to sell and deliver the shares and debentures, as aforesaid, and for approval of the Purchase Agreement, Proceeds Agreement and Agreement with Morgan Stanley & Co. Incorporated and authorizing his performance thereunder is on file in the office of the undersigned Bankruptcy Judge and may be examined and inspected in the office of the Bankruptcy Clerk, Room 230 of the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, by interested parties during regular Court hours. Additional information may be obtained by interested parties, to the extent available, through Weil, Gotshal & Manges, attorneys for Trustee, attention Harvey R. Miller, 767 Fifth Avenue, New York, New York 10022.

No offer to purchase the shares and debentures will be accepted unless the offeror satisfies the Trustee, the Agent and the Court that (a) such sale to the offeror will be in compliance with all applicable securities and other laws, (b) the offeror intends to acquire the shares and debentures for investment and not with a view to distribution, (c) the offeror shall have the capability to evaluate the merits and risks of an investment in the shares and debentures, including having had sufficient access to information pertaining to Zeller's, and that (d) the offeror possesses the capability to bear the economic risks of an investment in the shares and debentures.

NOTICE IS FURTHER GIVEN that the hearing to consider the Trustee's application and the sale of the shares and debentures, as aforesaid, and for the approval of the Purchase Agreement, Proceeds Agreement and Agreement with Morgan Stanley & Co. Incorporated, or such other higher or better offer as may be received may be adjourned from time to time, without notice to the Bankrupt, creditors or other parties in interest, other than the announcement of the adjourned date or dates at the said hearing.

BY ORDER OF THE COURT

Dated: New York, New York
May 28, 1976

JOHN J. GALGAY
Bankruptcy Judge
United States Courthouse
Foley Square
New York, New York 10007

Brig

18 Aug 1934 12

Baldwin & Smith

Great Lakes Corp. Ltd.

Attn: Mr. Appell & Gardner & Associates

Attn: Mr. Appell & Gardner & Associates